

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**





76-2163

76-2163-4

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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KENNETH WILLIAM SCHAFFER

VS:

CARL ROBINSON, WARDEN, CONNECTICUT  
CORRECTIONAL INSTITUTION AT SOMERS,  
CONNECTICUT

---

On Appeal from the United States District  
Court for the District of Connecticut

---

APPENDIX OF THE RELATOR - APPELLANT,  
KENNETH WILLIAM SCHAFFER

---

Frank R. Borowy  
Attorney For Relator-Appellant  
50 State Street  
Hartford, Connecticut 06103



PAGINATION AS IN ORIGINAL COPY



UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

A 1

PETITION FOR A WRIT OF HABEAS CORPUS  
(By a person in State custody)

FILED

APR 21 11 17 PM '75

Full name of Petitioner  
Kenneth William Schaffer

vs

Name of Respondent  
Carl Robinson

Civil No. 3593  
To be  
supplied  
by Clerk

H 75 / 128

1. Place of detention. Somers, Prison.
2. Name and location of the court which imposed sentence.  
Tolland Superior Court, Tolland County.
3. Case number or numbers in court where sentenced. 3593.
4. The offense or offenses for which sentence was imposed. Murder.
5. Date and terms of sentence or sentences. July 3th, 1973 17 to life.
6. Was a finding of guilty made: (Check one)  
(a) After a plea of guilty?  
(b) After a plea of nolo contendere?  
(c) After a trial by a judge? (x)  
(d) After a trial by a judge and jury?
7. Did you appeal from the judgment of conviction or sentence imposed? If you answered yes, then:  
(a) To what court or courts did you appeal? Conn. State Supreme Cou  
(b) State the decision or decisions of the court or courts to which you appealed. Denied Writ of Habeas corpus, Hartford Superior Court. February 27, 1975.  
(c) If you know, give the date of each decision and a copy or citation of each. February 27, 1975, copy is attach to this p
8. If you did not appeal from your conviction and sentence or sentences why did you not do so?

A-2

IN THE MATTER OF: SCHAFER V. WARDEN, memorandum delivered 27,  
February, 1975 Alexander, J.

The court held, in answer to Plaintiff's contention; (that the bench warrant was insufficient to confer jurisdiction on the plaintiff)

"The short answer to this argument is that any such claim is waived by reason of its not having been raised until long after his trial. Thus, the defendant is deemed to have submitted to the court's jurisdiction of his person and also to have waived any possible defect of the bench warrant, Reed v. Reincke, 153 Conn. 591.

While this ruling disposes of this claim, it may be also observed that the affidavit provided with the application for bench warrant amply satisfies constitutional requirements, Aguilar v. Texas, 378 US 23; State v. Licari, 153 Conn. 127. Thus, the failure to raise this issue in timely fashion would have not affected the result."

The reasoning of this decision, i.e., the Reed v. Reincke, "timely fashion" proviso has been moot, void and null by the United States Supreme Court by the authority of, Kaufman v. United States, 394 US 217, citing the pertinent provisions of: 28 USC § 2255; which has held:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time!"

The second part of the memorandum, is likewise in error.

The procedure of attaching affidavits, (whether or not the affidavit comports "oath or affirmation"), does not satisfy constitutional requirements under the Aguilar authority; Aguilar supposes that that statute itself, (which authorizes the issuance of the bench warrant), is constitutional and requires oath or affirmation.



A-3

Such is not the case with Connecticut General Statute § 54-43. This statute is constitutionally defective; (See exhibits A, B, attached, (the statute thereby, becomes a statute "repugnant" to the constitution, and as such ) falls victim to the authority of Ex parte Royall, 117 US 248 (29:870) which held:

"...when a state is enforcing a law, statute or statutory procedure repugnant to the Fourth Amendment to the Constitution, not only is the state court without jurisdiction over the person of the defendant... the state court is without jurisdiction whatever, and therefore, it can be said that there are no proceedings in the state court." (See Norton v. Shelby County, 118 US 425 (30:178)

Convictions rendered by a court lacking either personal or subject matter jurisdiction are constitutionally void, and has been a fundamental part of our Common Law jurisprudence. In United States Ex Rel Flemings v. Chafee, 458 F 2d 544 (1972) the language of the court in deciding retroactivity and jurisdictional defect is:

"The important question we must resolve can not be considered without reference to the rich history elucidating the effect an unconstitutional law, Almost 100 years ago, in Ex parte Siebold, 100 US 371, 376, 377, 25 L ed 717, (1879) the Supreme Court stated that;

'an unconstitutional law is void, and is as no law. An offense created by it, is not a crime. A conviction under it, is not merely erroneous, but is illegal and void, and can not be a legal cause of imprisonment.'"

An unconstitutional state, (unlike a leaning, diseased tree), can not be made either healthy or constitutional just by supportive instrumentation, such as the procedure of submitting affidavits (comporting "oath and affirmation") to correct the fatal defect in the statute which does not require oath or affirmation, and is therefore in violation of the Fourth Amendment to the Constitution of the United States.

In State v. Licari, supra, the language of the court is decisive:

"If the lack of oath or affirmation is a fatal defect and constitutional invalidity, it is unnecessary to consider the adequacy as a statement of probable cause of the facts recited in the application for the bench warrant....."



ANNOTATIONS TO THE  
CONSTITUTION OF THE UNITED STATES

'Statutory procedure for issuance of bench warrant (section 54-43) is in violation of this amendment since warrant may be issued without any facts, supported by oath or affirmation from which the court or judge issuing the warrant can make an independent determination of probable cause. 153 C. 132 Search by police officer, not made as an incident to a lawful arrest if otherwises reasonable, could be justified under this amendment, section 1, of the fourtheth amendment and article first, section 8, of the Connecticut constitution only on proof that protection afforded by these prvisions had been waived. 153 C. 70, 71 Where defendant failed to object at trial to introduction of evidence which he claimed had been procured by illegal search and sizure, he is barred from making objection for first time on appeal. 155 C.279. Rule re inadmissibility of illegally seizure evidance is not retrocutive to cases decided before it became law. 155 C. 316. Retrospective effect is not given to rule re illegally issued bench warrants, enunciated in State v. Licari 153 C. 127, in habeas corpus proceeding brought by prisoner for illegal detention. By his ploading and representation by counsel to jurisdiction of court by his trial and when no timely objection was made thereat concerning petitioner's allegedly illegal arrest, such claim cannot be later raised by habeas corpus proceeding alleging unlawful imprisonment.

By failure to object to procedure for bench warrant at any time during proceedings below, defendants submitted to jurisdiction of the court and cannot on appeal first claim reversible error



EXHIBIT B.

Sec. 54-43, Bench Warrant. Procedure on arrest. Upon the representation of any state's attorney that he has reasonable ground to believe that a crime has been committed within his jurisdiction, the superior court or when said court is not in session, any judge thereof, may issue a bench warrant for the arrest of the person or persons complained against, and in such case shall except in cases punishable by death or life imprisonment, fix a bond for the appearance of such person or persons in such amount as to said court or to such judge appears reasonable. When any person is arrested on a bench warrant issued by order of the superior court or, when said court is not in session, by a judge thereof, the officer or indifferent person making such arrest (shall without undue delay bring such person before the clerk or assistant clerk of the superior court for the county where such warrant was issued,)

150 C. 169.

"Procedure for issuance of bench warrant is in violation of fourth amendment to the federal constitution since it may be issued without any facts supported by oath or affirmation, from which the court or judge issuing the warrant can make an independent determination of probable cause. 153 C. 132. Statute requires arraignment "forthwith" after arrest;



9. Now state simply and briefly why you believe that you are unlawfully in custody. Be sure and give all facts which support your reasons. Arrested without a warrant. Illegally in prison. Was not arraigned "forthwith". Was not advise of no-rights. Claim to arrested under a unconstitutional Statutes - sec. 54-43. Misrepresent by counsel. Most of all I am innocence, of this crime.
10. Before filing this petition have you filed in any State or Federal court any petition for a writ of habeas corpus or for any other relief? Yes.
- (a) If you have, name the court or courts and the results of your filing those petitions or motions. Hartford, Superior Court, Denied petition,
- (b) On what ground or grounds did you seek relief in those petitions or motions? Constitutional rights and state
- (c) If the ground or grounds in those motions or petitions did not include the grounds you set forth in this petition, why did you not set forth these grounds?
11. Were you represented by an attorney or attorneys at any time during the course of the proceedings against you? Yes.
- (a) Name and give the address of such attorney or attorneys, if any, and state at what stage of the proceedings he or they represented you. Lawernce C. Klaczak, public defender, Rockville Conn. beginning of the trial, Leonard I. Shankman, public defender, representing habeas corpus hearing. 799 Main St. Htfd.
12. Have you read the instructions furnished with this petition and checked all of the answers and statements made in this petition? Yes.

Kenneth A. Schaffer  
Signature of Petitioner

State of Connecticut )  
County of Tolland ) ss

Kenneth Schaffer, being first duly sworn, states that he  
Name of Petitioner  
has signed the foregoing petition and that the information therein is  
true and correct to the best of his knowledge and belief.

Kenneth Schaffer  
Signature of Petitioner

Subscribed and sworn to before me this 7 day of April 1975



DISTRICT OF CONNECTICUT

A-7

MOTION FOR PERMISSION TO PROCEED IN FORMA PAUPERIS AND AFFIDAVIT

Kenneth William Schaffer

Full Name of Petitioner

Civil No. \_\_\_\_\_

To be Supplied  
by the Clerk

vs.

Carl Robinson

The undersigned Petitioner or Movant respectfully moves this Court that he be permitted to file the accompanying Motion or Petition without payment of the required filing fee, and to proceed in this matter in forma pauperis.

In support of this motion he states, under oath, that:

1. He has not sufficient funds with which to pay the filing fee and other costs and has no means of securing such funds.
2. He is possessed of no property except Raido and Typewriter.

3. The balance in his commissary or other institutional account or accounts is \$ Under \$5, \*

Dated at \_\_\_\_\_ this \_\_\_\_\_

day of \_\_\_\_\_ 19 \_\_\_\_\_

Kenneth W. Schaffer  
Petitioner or Movant

Subscribed and sworn to before me this 7, day

of April, 19 75.

David A. Harris  
Notary Public  
My Commission Expires Mar. 31, 1973

\*This statement is correct.

\_\_\_\_\_  
Institutional Officer



DISTRICT OF CONNECTICUT

APR 27 4 10 PM '75

A-8

PETITION FOR A WRIT OF HABEAS CORPUS  
(By a person in Federal custody)

COURT  
CONN.

H 75 / 129

Civil No.

To be

supplied by the  
Clerk

Kenneth Schaffer  
Full name of Petitioner

VS

Carl Robinson  
Name of Respondent

1. Place of detention. Somers, Prison.
2. Name and location of the court which imposed sentence.  
Tolland Superior Court, Tolland County.
3. ~~Case number or numbers in court where sentenced.~~ 3593.
4. The offense or offenses for which sentence was imposed. Murder.
5. Date and terms of sentence or sentences. July 3rd. 1973. 17 to life.
6. Was a finding of guilt made : (Check one)
  - (a) After a plea of guilty?
  - (b) After a plea of nolo contendere?
  - (c) After a trial by a judge? (x)
  - (d) After a trial by a judge and jury?
7. Did you appeal from the judgment of conviction or sentence imposed?  
If you answered yes, Then:
  - (a) To what court or courts did you appeal? Conn. Supreme Court
  - (b) State the decisions of the court or courts to which you appealed. Refuses Appeal.
  - (c) If you know, give the date of each decision and a copy or citation of each.  
April 8, 1975
8. If you did not appeal from your conviction and sentence or sentences why did you not do so?



2. Now state simply and briefly why you believe that you are unlawfully in custody. Be sure and give all the facts which support your reasons. Denied constitution's laws & State's laws. A-9

10. Have you filed previous petitions for habeas corpus, motions under section 2255 of Title 28, United States Code, or any other applications, petitions or motions with respect to this conviction? Yes.

11. If you answered yes to (10), list with respect to each petition, motion or application:

(a) The specific nature thereof: Illegally arrested, & unconstitutional search and seizure. Conflicting Statements.

(b) The name and location of the court in which each was filed:

Hartford, Superior Court, Hartford, County.

(c) The disposition thereof: Denied.

(d) The date of each disposition:

February 27, 1975, and April 8, 1975.

(e) If known, citations of any written opinions or orders entered pursuant to each such disposition:

12. If you did not file a motion under section 2255 of Title 28 United States Code, or if you filed such a motion and it was denied, state why your remedy by way of such motion is inadequate or ineffective to test the legality of your detention:

13. Has any ground set forth in (9) been previously presented to this court or any other federal court by way of petition for habeas corpus, motion under section 2255 of Title 28, United States Code, or any other petition, motion or application?  
Yes.

14. If you answered yes to (13), identify:

(a) Which grounds have been previously presented: Arrested without a warrant. Illegally in prison. Was not arraigned "forthwith". Not advised of rights.

(b) The proceedings in which each ground was raised: (rights.)

#### PROCEEDINGS GROUNDS:

1. The prejudicial effect of the admission of the photograph of the victim's body:
2. The court Improperly permitted Trooper Sraithwaite to testify as to the statements made to him by the defendant:
3. The test performed by the state police with the defendant's car constituted an illegal warrantless search: F.C.:C-1-b
4. Testimony concerning physical measurements taken subsequent to the murder were not properly admissible without a prior showing of similar conditions:
5. The court erroneously failed to strike the opinion testimony of a lay witness:
6. The state's case circumstantial evidence failed to sustain the state's burden of proof:



15. Were you represented by an attorney or attorneys at any time during the course of the proceedings against you?

Yes.

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(a) Name and give address of such attorney or attorneys, if any, and state at what state of the proceedings he or they represented you.

Mr. Edwin M. Lavitt, 1. Ellington Ave, Rockville, Conn.  
Represented the course of the trial.

16. Have you read the instructions furnished with this petition and checked all of the answers and statements made in this petition? Yes.

Kenneth Shaffer  
Signature of Petitioner

State of Connecticut ) ss  
County of Tolland )

Kenneth Shaffer, being first duly sworn,  
Name of Petitioner  
states that he has signed the foregoing petition and that the information therein is true and correct to the best of his knowledge and belief.

Kenneth Shaffer  
Signature of Petitioner

Subscribed and sworn to before me this 14th day of April, 1975.

David A. Harris  
Notary Public  
My Commission Expires Mar. 31, 1979

(Approved by the court February 1, 1965.)

D.C.:C-1-b

## UNITED STATES DISTRICT COURT

## DISTRICT OF CONNECTICUT

A-11

MOTION FOR PERMISSION TO PROCEED IN FORMA PAUPERIS AFFIDAVIT

Kenneth Schaeffer  
Full Name of Petitioner

Civil No. \_\_\_\_\_  
To be supplied  
by the Clerk

VS

Carl Robinson  
Name of Respondent

The undersigned Petitioner or Movant respectfully moves the Court that he be permitted to file the accompanying Motion or Petition without payment of the required filing fee, and to proceed in this matter in forma pauperis.

In support of this motion he states, under oath, that:

1. He has not sufficient funds with which to pay the filing fee and other costs and has no means of securing such funds.
2. He is possessed of no property except Raido & type-writer.
3. The balance in his commissary or other institutional account or accounts is \$ None.\*

Dated at Somers. Conn. this 14th.  
day of April, 19 75.

Kenneth Schaeffer  
Petitioner or Movant  
James L. ...

Subscribed and sworn to before me this 14th. day of  
April, 19 75.

David A. ...  
Notary Public  
My Commission Expires Mar 31, 1979

\* This statement is correct

\_\_\_\_\_  
Institutional Officer

\_\_\_\_\_  
Title

D.C.:C-1-c



UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

A-12

KENNETH WILLIAM SCHAFFER :

VS. :

H75-128

CARL ROBINSON :

AMENDED MOTION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF CONNECTICUT:

Pursuant to 28 U.S.C., Section 2255, the Petition of relator,  
KENNETH SCHAFFER, by his attorney, Frank R. Borowy, alleges as  
follows:

1. Relator is presently in the custody of the Connecticut  
Commissioner of Corrections and more specifically of the Warden  
of the State Prison at Somers.

2. Relator was convicted of murder in the first degree after  
a trial of a three judge panel, namely Honorable Danahy, J.  
residing, and Honorable Barber, J. and Honorable Rubinow, J. on  
March 16, 1973 in criminal action number 3593, Tolland County  
Superior Court at Rockville.

3. On July 3, 1973, Relator was sentenced to prison for not  
less than seventeen (17) years nor more than life.

4. The Relator petitioned the Superior Court, Hartford County  
for a writ of Habeas Corpus which was denied by Honorable  
Alexander, J., February 27, 1975.

5. Then came the Relator upon original petition to this Court  
for writ of Habeas Corpus, April 7, 1975.

CHARLES E. MOLLER, JR.  
ATTORNEY AT LAW  
50 STATE STREET  
HARTFORD, CONNECTICUT  
06103  
(203) 527-9297  
JURIS NO. 38452



6. The arrest, conviction, and sentence for which Relator is being detained was imposed in violation of his constitutional rights in that:

a. The Relator was not advised of his right to remain silent when a statement was requested by the Connecticut State Police on July 4, 1972, even though he was a suspect or considered a suspect.

b. The Relator was arrested without a warrant, or without a valid warrant.

c. The accused was arrested and detained under Section 54-43 of the Connecticut General Statutes of which itself is unconstitutional.

d. After said arrest Relator was not arraigned forthwith and was thereby denied his constitutional rights.

e. The Relator was not furnished with a list of witnesses to appear before the grand jury after such a request was made, all to his prejudice.

f. The Relator through the mistake of his Court appointed counsel, was not sufficiently advised of his right to elect a trial by jury.

g. The Relator through the mistake of his Court appointed counsel, was not advised to request a change of trial venue in that he was a black man subject to a jury panel, which due to the racial composition of the Tolland County area, could only be comprised of members predominantly of the white race.

7. Because of the foregoing facts, Relator is being restrained of his liberty in violation of the Constitution of the United States and the concept of fundamental fairness.

CHARLES E. MOLLER, JR.  
ATTORNEY AT LAW  
50 STATE STREET  
HARTFORD, CONNECTICUT  
06103  
(203) 527-9297  
JURIS NO. 38452



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Wherefore, because of the foregoing facts, Relator prays that (1) The writ sought herein be granted, (2) His conviction be set aside and a new trial be granted him, (3) That the Relator be granted such other and further relief including reasonable bail pending the ultimate disposition of this proceeding, as this Court may deem just.

THE RELATOR

KENNETH WILLIAM SCHAFER

BY

Frank R. Borowy  
50 State Street  
Hartford, Connecticut 06103

Subscribed to before me this 4th day of March, 1976

CHARLES E. Moller Jr.

This is to certify that a copy of the above amended motion for writ of habeas corpus was mailed to Jerrold H. Barnett, assistant State's Attorney, Room 1, City Station, New Haven, Connecticut 06525 on 1976.

Frank R. Borowy

CHARLES E. MOLLER, JR.  
ATTORNEY AT LAW  
50 STATE STREET  
HARTFORD, CONNECTICUT  
06103  
(203) 527-9297  
JURIS NO. 38452

KENNETH WILLIAM SCHAFFER, :  
Petitioner, :

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CIV. NO. H75-129

CARL ROBINSON, WARDEN, :  
CONNECTICUT CORRECTIONAL :  
INSTITUTION, SOMERS, :  
Respondent. :

AMENDED MOTION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF CONNECTICUT:

Pursuant to 28 U.S.C., Section 2255, the Petition of Relator,  
KENNETH SCHAFFER, By his attorney, Frank R. Borowy, alleges as  
follows:

1. Relator is presently in the custody of the Connecticut  
Commissioner of Corrections and more specifically of the Warden  
of the State Prison at Somers.
2. Relator was convicted of murder in the first degree after a  
trial of a three judge panel, namely Honorable Dannehy, J.  
presiding, Honorable Barber, J., and Honorable Rubinow, J. on  
March 16, 1973 in criminal action number 3593, Tolland County  
Superior Court at Rockville.
3. On July 3, 1973, Relator was sentenced to prison for not less  
than seventeen (17) years nor more than life.
4. The Relator appealed his conviction to the Supreme Court of  
the State of Connecticut, However, on April 7, 1975, said Court  
found no error.

CHARLES E. MILLER JR.  
ATTORNEY AT LAW  
50 STATE STREET  
HARTFORD, CONNECTICUT  
06103  
(203) 527-9497  
JURIS NO. 38452



5. Then came the Relator upon Petition of Habeas Corpus dated <sup>A16</sup> April 14, 1975 to this Court.

6. The arrest, conviction, and sentence for which Petitioner is being detained was imposed in violation of his constitutional rights in that:

a. The Petitioner was not advised of his right to remain silent when a statement was requested by the Connecticut State Police on July 4, 1972, even though he was a suspect or considered a suspect.

b. The Relator was subjected to unconstitutional searches and seizures of his motor vehicle.

c. The Trial Court erred in permitting the State to enter a photograph of the body of the slain victim in disregard of its shocking and prejudicial nature.

d. The Trial Court erred in admitting the testimony of Trooper Braithwaite, the Relator's statements made on July 4, 1972 which were not subject to MIRANDA warning even though the Relator was a suspect.

e. The Trial Court erred in the admission of a road test performed upon the Relator's vehicle even though said test was not made pursuant to the consent of the Relator nor to a legal warrant, or any warrant at all.

f. The Trial Court/<sup>erred</sup> in its discretion allowing testimony concerning physical measurements taken subsequent to the death of the victim even though they were not properly admissible without a prior showing of similar conditions.

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g. The Trial Court erred in its discretion allowing a minor lay witness to testify as to a dried red substance which she allegedly observed on an automobile window as the chemical substance blood.

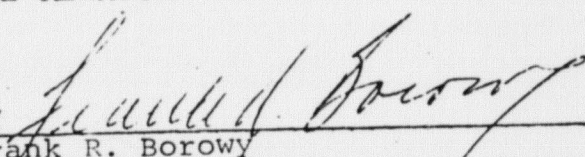
h. The Trial Court erred upon entering a verdict of guilty without the sustaining of the burden of proof by the State.

7. Because of the foregoing facts, Relator is being restrained of his liberty in violation of the Constitution of the United States and the concept of fundamental fairness.

WHEREFORE, because of the foregoing facts, Relator prays that (1) The writ sought herein be granted, (2) His conviction be set aside and a new trial be granted him, (3) That the Relator be granted such other and further relief including reasonable bail pending the ultimate disposition of this proceeding, as this Court may deem just.

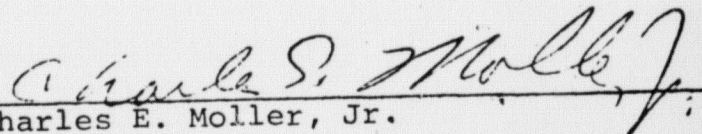
THE RELATOR

BY

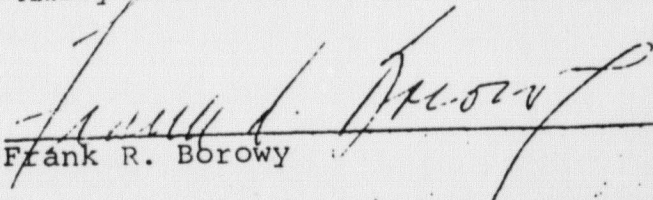
  
Frank R. Borowy  
50 State Street  
Hartford, Connecticut 06103

CHARLES E. MOLLER, JR.  
ATTORNEY AT LAW  
50 STATE STREET  
HARTFORD, CONNECTICUT  
06103  
(203) 527-9297  
JUR 5 NC 38452

Subscribed to before me this 4th day of March, 1976

  
Charles E. Moller, Jr.

This is to certify that a copy of the above amended motion for writ of habeas corpus was mailed to Jerrold H. Barnett, assistant State's Attorney, Drawer H, Amity Station, New Haven, Connecticut 06525 on March 4th, 1976.

  
Frank R. Borowy



A-18

KENNETH W. SCHAFFER, :

Petitioner, :

vs. : CIVIL NO. H75-128

CARL ROBINSON, :

Respondent. :

1. Paragraphs one to five of the amended motion are admitted except that the respondent believes that the conviction occurred on March 13, 1973.

2. This action concerns, inter alia, issues previously litigated in a state habeas corpus action. In order to facilitate consideration of the issues, the respondent appends copies of:

(a) the petitioner's amended writ of habeas corpus addressed to the state Superior Court. (Exhibit A; the respondent apologizes for and does not claim the extraneous writings, but the copy was the only one available).

(b) a copy of the transcript of the habeas corpus hearings. (Exhibit B).

(c) a copy of the opinion by Judge Alexander (Exhibit C)

3. The claim raised in paragraph 6(a) is the same as that raised in the companion case, H75-129, and the response to that allegation is incorporated herein.

4. Paragraph 6(b) is denied. A copy of the bench warrant and the supporting affidavit is appended as Exhibit D. See also



5. Paragraph 6(c) is admitted, except that portion which alleges that §54-43 of the Connecticut General Statutes is unconstitutional. Further, this issue was neither raised nor decided in state court, and consideration of it ought not to be considered by this court until state relief has been exhausted.

6. Paragraph 6(d) is denied. See Exhibit A and Exhibit C, p. 1. See also copies of an affidavit of the clerk of the Superior Court for Tolland County (Exhibit E), of the mittimus issued on August 25, 1972 (Exhibit F) and of the mittimus issued on August 30, 1972 (Exhibit G).

7. Paragraph 6(e) is admitted insofar as it alleges that request for a list of witnesses to appear before the grand jury was made and denied. Prejudice and any error, particularly of constitutional dimension, are denied. See Exhibit C, pp. 2-3.

8. Paragraphs 6(f) and (g) apparently allege incompetent counsel as to advice given concerning jury trial and change of venue. This issue has been neither raised nor decided in the state courts and, especially as factual matters may be in dispute, it should not be entertained in this court at this time. The respondent requests that these claims be dismissed without prejudice. As to the truth of the allegations, the respondent has insufficient information on which to form a belief.

9. Paragraph 7 is denied.

THE RESPONDENT

By \_\_\_\_\_  
ROBERT E. BEACH, JR.  
ASSISTANT STATE'S ATTORNEY  
DRAWER H, AMITY STATION  
NEW HAVEN, CONNECTICUT 06525



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CERTIFICATION

This is to certify that on July 19, 1976, copies of the foregoing and the exhibits were mailed to Frank R. Borowy, Esq., 50 State Street, Hartford, Conn. 06103.

---

ROBERT E. BEACH, JR.



UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

A-21

KENNETH SCHAFFER,

Petitioner,

v.

CARL ROBINSON,

Respondent.

:  
:  
:  
:  
:  
:

CIVIL NO. H75-129

RETURN

1. Paragraphs one through five of the petitioner's amended motion for a writ of habeas corpus are admitted except that the respondent believes that:

- (a) the conviction occurred on March 13, 1973; and
- (b) the decision of the Connecticut Supreme Court was announced on April 8, 1975.

2. To facilitate consideration of this action, which involves exclusively matters raised in the petitioner's direct appeal from the Superior Court to the Supreme Court, the respondent attaches hereto copies of the record of the appeal (Exhibit A) and the opinion of the Connecticut Supreme Court (Exhibit B).

3. Paragraphs 6(a) and 6(d) are denied. The Superior Court found and the Supreme Court agreed that the petitioner on July 4, 1972, was not a suspect nor was he in custody. See p. 6 of Exhibit A and State v. Schaffer, 168 Conn. 309, 313-14 (1975), (Exhibit B). The respondent admits that the statements were introduced at trial and that no Miranda warnings had been given.

4. Paragraphs 6(b) and 6(e) are denied. See pp. 7-15 of State's Exhibit A; pp. 315-17 of State v. Schaffer. A copy of



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the written consent to search is appended as Exhibit C and a copy of the search warrant and return as Exhibit D.

5. Paragraph 6(c) is denied. See p. 5 of Exhibit A and pp. 312-13 of State v. Schaffer. The respondent further asserts that this claim is not of constitutional dimension.

6. Paragraph 6(f) is denied; see pp. 13-15 of Exhibit A and pp. 316-18 of State v. Schaffer. The respondent further asserts that this claim is not of constitutional dimension.

7. Paragraph 6(g) is denied. See pp. 15-16 of Exhibit A and pp. 318-19 of State v. Schaffer. This claim is not of constitutional dimension.

8. Paragraph 6(h) is denied. See p. 16 of Exhibit A and pp. 310-12 of State v. Schaffer.

9. Paragraph 7 is denied.

THE RESPONDENT

By \_\_\_\_\_  
ROBERT E. BEACH, JR.  
ASSISTANT STATE'S ATTORNEY  
DRAWER H, AMITY STATION  
NEW HAVEN, CONNECTICUT 06525

CERTIFICATION

This is to certify that on July 19, 1976, copies of the foregoing and of the exhibits were mailed to Frank R. Borowy, Esq.  
50 State Street, Hartford, Conn. 06103

\_\_\_\_\_  
ROBERT E. BEACH, JR.



UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

A-23

KENNETH SCHAFFER, :  
Petitioner, :  
vs. : CIVIL NO. H75-129  
CARL ROBINSON, :  
Respondent. :

AMENDED RETURN

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, the respondent wishes to amend his return in the following manner:

With respect to paragraphs 6(b) and 6(e), the respondent claims that no relief may be granted by a federal district court in a habeas corpus action. Stone v. Powell, \_\_\_\_ U.S. \_\_\_\_, 19 \_\_\_\_ Crim. L. Rep. 3333 (July 6, 1976).

THE RESPONDENT

By Robert E. Beach, Jr.  
ROBERT E. BEACH, JR.  
ASSISTANT STATE'S ATTORNEY  
DRAWER H, AMITY STATION  
NEW HAVEN, CONNECTICUT 06525

CERTIFICATION

This is to certify that a copy of the foregoing was mailed on July 20, 1976 to Frank R. Borowy, Esq., 50 State Street, Hartford, Conn. 06103.

Robert E. Beach, Jr.  
ROBERT E. BEACH, JR.



UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

A-24

KENNETH WILLIAM SCHAFFER, :

Petitioner :

: CIV. NO. H75-128

CARL ROBINSON, :

Respondent, : AUGUST 11, 1976

TRAVERSE OF THE PETITIONER

1. The return of the respondent is admitted by the petitioner as to paragraphs 1-5.

2. The return of the respondent is admitted except that attached exhibits are not certified and therefore can not be admitted as certified.

3. The return of the respondent as to paragraph 6 (a) was denied except a portion of the return where it is admitted that the statements were introduced to trial and no Miranda warning had been given.

4. The return regarding paragraph 6 (b) is denied.

5. The return pertaining to paragraph 6 (c) is denied as to the State's denial of the unconstitutionality of Connecticut General Statute Section 54-43.

6. The return pertaining to paragraph 6 (d) is denied.

7. The return concerning paragraph 6 (e) is admitted by the petitioner as far as the request by the petitioner for a list of witnesses to appear before the Grand Jury was refused. The rest of paragraph 7 is denied by the petitioner.

8,9. Paragraphs 8 and 9 of the respondent's return are hereby denied by the petitioner in that:

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A. It was futile to litigate such issues before the Connecticut Courts because such litigation would have resulted in a denial. A-25

B. It would be implausible to assume that any and all counsel of record in the State proceedings that raised these issues because they were the very ones that did not claim the case for a jury trial and/or failed to make such motions before the Connecticut Courts for a change of venue. Such counsel would be the last to claim that jury trial and venue were errors in that they participated in this error. Such participation in this error may have been directly or indirectly caused by the knowledge that it would have been futile to litigate this issue before the Connecticut Courts.

THE PETITIONER

KENNETH WILLIAM SCHAFFER

BY

/s/ Frank R. Borowy  
Frank R. Borowy

CERTIFICATION

I, KENNETH WILLIAM SCHAFFER, having read the foregoing and acknowledge the following to be true to my best information, knowledge and belief.

/s/ Kenneth Schaffer  
Kenneth William Schaffer

Subscribed and sworn to before me this 11th day of August, 1976.

/s/ Frank R. Borowy  
Frank R. Borowy

This is to certify that a copy of the foregoing was mailed on August , 1976 to Robert E. Beach, Jr., Drawer, H, Amity Station, New Haven, Connecticut 06525

Frank R. Borowy  
Frank R. Borowy

CHARLES E. MOLLER, JR.  
ATTORNEY AT LAW  
50 STATE STREET  
HARTFORD, CONNECTICUT  
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UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

A-26

KENNETH WILLIAM SCHAEFFER, :  
Petitioner :  
: CIV. NO. H75-129  
CARL ROBINSON, WARDEN, :  
CONNECTICUT CORRECTIONAL :  
INSTITUTION, SOMERS, :  
Respondent, ; AUGUST 11 , 1976

TRAVERSE OF THE PETITIONER

1. All of paragraph 1 of the respondent's return is admitted.

2. Paragraph 2 is admitted except that the exhibits are not certified.

3. The respondent's return pertaining to paragraph 6 (a) and (d) of the petition are denied except that portion of the return where it is admitted that "the statements were introduced at the time of trial and no Miranda warnings had been given".

4. As to the portion of the respondent's return pertaining to paragraphs 6 (b) and (e) of the petition, the petitioner hereby denies.

5. The portion of the respondent's return pertaining to paragraph 6 (c) of the petition is denied.

6. The portion of the respondent's return pertaining to paragraph 6 (f) of the petition is denied.

7. The portion of the respondent's return pertaining to paragraph 6 (g) of the petition is denied.

8. The portion of the respondent's return pertaining to paragraph 6 (h) of the petition is denied.

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9. Paragraph 9 of the respondent's return is denied.

THE PETITIONER

KENNETH WILLIAM SCHAFFER

BY /s/ Frank R. Borowy  
Frank R. Borowy

CERTIFICATION

I, KENNETH WILLIAM SCHAFFER, Having read the foregoing and acknowledge the following to be true to my best information, knowledge and belief.

/s/ Kenneth Schaffer  
Kenneth William Schaffer

Subscribed and sworn to before me this 11th day of August, 1976.

/s/ Frank R. Borowy  
Frank R. Borowy

This is to certify that a copy of the foregoing was mailed on August 11, 1976 to Robert E. Beach, Jr., Drawer H, Amity Station, New Haven, Connecticut 06525.

/s/ Frank R. Borowy  
Frank R. Borowy

CHARLES E. MOLLER, JR.  
ATTORNEY AT LAW  
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KENNETH WILLIAM SCHAFFER, :

Petitioner, :

CIV. NO. H75-128

CARL ROBINSON, :

Respondent, :

August 11, 1976

REQUEST FOR EVIDENTIARY HEARING

Pursuant to 28 USC 2254 (d), The Petitioner hereby requests the Court to grant the Petitioner an evidentiary hearing in that:

1. That the merits of the factual dispute were not resolved in the State Court hearing.

2. That the factfinding procedure employed by the State Court was not adequate to afford a full and fair hearing.

3. That the material facts were not adequately developed at the State Court hearing.

4. That the applicant did not receive a full, fair, and adequate hearing in the State Court proceedings.

5. That the applicant was otherwise denied due process of law in the State Court proceedings.

THE PETITIONER

KENNETH WILLIAM SCHAFFER

BY /s/ Frank R. Borowy  
Frank R. Borowy

CHARLES E. MOLLER, JR.  
ATTORNEY AT LAW  
50 STATE STREET  
HARTFORD, CONNECTICUT  
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(203) 527-9297  
JURIS NO. 38452

CERTIFICATION

This is to certify that a copy of the foregoing was mailed on August 11, 1976 to Robert E. Beach, Jr., Drawer H, Amity Station, New Haven, Connecticut 06525

/s/ Frank R. Borowy  
Frank R. Borowy

KENNETH WILLIAM SCHAFER,

Petitioner,

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CARL ROBINSON, WARDEN,  
CONNECTICUT CORRECTIONAL  
INSTITUTION, SOMERS,

Respondent.

CIV. NO. H75-129

AUGUST 11, 1976

REQUEST FOR EVIDENTIARY HEARING

Pursuant to 28 USC 2254 (d), The Petitioner hereby requests the Court to grant the Petitioner an evidentiary hearing in that:

1. That the merits of the factual dispute were not resolved in the State Court hearing.
2. That the factfinding procedure employed by the State Court was not adequate to afford a full and fair hearing.
3. That the material facts were not adequately developed at the State Court hearing.
4. That the applicant did not receive a full, fair, and adequate hearing in the State Court proceeding.
5. That the applicant was otherwise denied due process of law in the State Court proceeding.

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JURIS NO. 38452

THE PETITIONER

KENNETH WILLIAM SCHAFER

BY

Frank R. Borow

CERTIFICATION

This is to certify that a copy of the foregoing was mailed on August 11, 1976 to Robert E. Beach, Jr., Drawer H, Amity Station, New Haven, Connecticut 06535

Frank R. Borow



UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

CLERK  
DISTRICT COURT  
HARTFORD, CONN. A-30

KENNETH SCHAFFER :  
v. : CIVIL NOS.  
CARL ROBINSON : H-75-128 and H-75-129

MEMORANDUM OF DECISION

Kenneth Schaffer, a state prisoner, is serving a sentence of 17 years to life imposed on him as a result of his conviction for the first degree murder of his wife following a trial before a panel of three Superior Court judges.

He has brought two petitions for a writ of habeas corpus which will be considered together, since they overlap.

His claims will be considered seriatim.

First Claim - He was arrested without a warrant, or without a valid warrant.

The rule that an illegal arrest without more will not void a conviction, nor support a collateral attack upon it by habeas corpus is well established. In the very recent case of Stone v. Powell, 44 U.S.L.W. 5313, 5318 (U.S. July 6, 1976) the Supreme Court cited Frisbie v. Collins, 342 U.S. 519 (1953) with approval for the rule that "judicial proceedings need not abate when the defendant's person is unconstitutionally seized." See United States ex rel. Orsini v. Reincke, 286 F. Supp. 974 (D. Conn.), aff'd, 397 F.2d 977 (2d Cir. 1968).

1/

Detailed exposition of the facts is unnecessary; they appear fully in State v. Schaffer, 168 Conn. 309 (1975), the opinion in affirming his conviction.



Second Claim - He was subjected to unconstitutional searches and seizures of his motor vehicle. A

The record establishes that he consented in writing to the search of his car; also a warrant later issued for the seizure of his car was not challenged. Furthermore, as is the case here,

"where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim the Constitution does not require that a state prisoner be granted habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."

Stone v. Powell, 44 U.S.L.W. 5313, 5317.

Third Claim - He claims that evidence against him was improperly admitted at his trial:

- (a) a photograph of the slain victim at the place where her body was discovered;
- (b) testimony of a witness that substance observed by her on a window of the defendant's auto was dried blood;
- (c) testimony of measurements of the width of the tracks left by the wheels of his car and of the width of the tires and of its turning radius.

These alleged errors in the admission of evidence do not rise to constitutional stature, and will not support a writ of habeas corpus. Robinson v. Wolff, 349 F. Supp. 514, 526 (D. Neb.), aff'd, 468 F.2d 438 (8th Cir. 1972), held specifically that admission of color photographs of the deceased victim after autopsy could not support habeas relief. Crisafi v. Oliver, 396 F.2d 293, 294 (9th Cir.), cert. denied, 393 U.S. 889 (1968); United States ex rel. Bryant v. Vincent,



373 F. Supp. 1180, 1183-84 (S.D.N.Y. 1974); Holliday v. Adams, 325 F. Supp. 444 (D. Conn. 1970), aff'd, 443 F.2d 7 (2d Cir. 1971).

Fourth Claim - Admission into evidence of a statement made by him to an investigating police officer.

It was clearly established during the trial that the statement was freely made by him when he was neither held under detention nor under suspicion. On the day following the murder, after having heard a newscast on television reporting that a dead Negro female had been found in Ellington, the defendant appeared with others at a hospital where he identified the body as that of his wife. He said he believed the body to be that of his wife because of the description of a tattoo on the body. The statement he made was not only exculpatory, it was made during the course of routine investigatory proceedings. The trial court found both subordinate and ultimate facts to support the conclusion that the petitioner was not in custody, nor under suspicion, when the statement was given. See State v. Schaffer, 168 Conn. 309, at 313-14. Under the circumstances a Miranda-type warning as mandated by Miranda v. Arizona, 384 U.S. 436 (1966) was not required. The validity of those findings are not questioned under 28 U.S.C. § 2254(d).

All of the foregoing claims are made in the amended petition, Civil No. H-75-129. Whether considered singly or in combination, they do not support a writ of habeas corpus.



Earlier, in petition Civil No. H-75-128, as amended, the following grounds were alleged: (1) after he was arrested he was not arraigned forthwith as required by § 54-43, Conn. Gen. Stat. Ann.; and (2) he was not furnished with a list of witnesses to appear before the grand jury that indicted him.

As to the first, it appears that on August 25, 1972, he was arrested pursuant to a valid warrant and presented to a correctional center on the same date--in full compliance with § 54-43. At the next session of the Superior Court, which was August 30, 1972, he was arraigned.

As to the second, he was permitted to attend the grand jury's inquest. Furthermore, he has no constitutional right to know who the witnesses before the grand jury were.

There is no merit to either of those claims as a basis for a writ of habeas corpus.

Finally, he alleges in Civil No. H-75-128, that, through a mistake of his court-appointed counsel, he was not sufficiently advised of his right to elect a trial by jury; and, through a like mistake, he was not advised to request a change of trial venue in that he was a black man, subject to a jury panel which, due to the racial composition of the Tolland County area, could only be comprised of members predominantly of the white race. Since neither of these claims have been raised before the state courts, this court may not consider them for lack of exhaustion of available state remedies. 28 U.S.C. § 2254(b).



- 5 -

For the reasons stated above, both petitions, Civil  
Nos. H-75-128 and H-75-129, are dismissed.

SO ORDERED.

Dated at Hartford, Connecticut, this <sup>st</sup> 21 day of  
September, 1976.

M. Joseph Blumenfeld  
M. Joseph Blumenfeld  
United States District Judge



UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

FILED

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A-35

-----  
KENNETH SCHAFER

vs.

CARL ROBINSON  
-----

CLERK  
U.S. DISTRICT COURT  
HARTFORD, CONN.

CIVIL ACTION NO. H 75-128

JUDGMENT

The above-entitled action came on for consideration by the Court by the Honorable M. Joseph Blumenfeld, United States District Judge; and,

The Court having filed its Memorandum of Decision denying the Petitioner's Petition for a Writ of Habeas Corpus and dismissing the action;

It is accordingly ORDERED and ADJUDGED that the Petitioner's Petition be and is hereby denied and dismissed.

Dated at Hartford, Connecticut, this 29th day of September, 1976.

SYLVESTER A. MARKOWSKI  
Clerk, United States District Court

By: *William H. Singleton*  
Deputy-in-Charge



UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

FILED

A-36

CLERK  
U.S. DISTRICT COURT  
HARTFORD, CONN.

-----  
KENNETH SCHAFFER

vs.

CARL ROBINSON  
-----

CIVIL ACTION NO. H 75-129

JUDGMENT

The above-entitled action came on for consideration by the Court by the Honorable M. Joseph Blumenfeld, United States District Judge; and,

The Court having filed its Memorandum of Decision denying the Petitioner's Petition for a Writ of Habeas Corpus and dismissing the action;

It is accordingly ORDERED and ADJUDGED that the Petitioner's Petition be and is hereby denied and dismissed.

Dated at Hartford, Connecticut, this 29th day of September, 1976.

SYLVESTER A. MARKOWSKI  
Clerk, United States District Court

By: 

Deputy-in-Charge



UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

4-37

KENNETH SCHAFFER :  
 Petitioner, :  
 VS. : CIVIL NO. H75-128, H75-129  
 CARL ROBINSON : MEMORANDUM OF PETITIONER-  
 Respondent, : APPELLANT RE: CERTIFICATE OF  
 PROBABLE CAUSE

The appellant believes that there is probable cause to pursue an appeal. The test of probable cause is neither the fair preponderance of the evidence or proof beyond a reasonable doubt rather it is that scintilla or thread that indicates that the appellant's position has a possibility to prevail. The test is not a burdensome one. In the instant action, the appellant Kenneth Schaffer is supported by authority which indicates that he may prevail on an appeal.

First, the petitioner contends that he was not given his MIRANDA warnings prior to the investigation focusing upon him. The record of the proceedings furnished by the respondent failed to show that the estranged husband of the decedent was not the only suspect when he was questioned by the police and gave statements the night after the victim's death. It is a well established principal of police work that family members are the most suspected potential perpetrators of homicides. Over eighty (80%) percent of the homicides in this country are committed by family members or close friends of the victim, (Bailey & Rothblatt, INVESTIGATION AND PREPARATION OF CRIMINAL CASES, p 380, 1970). Furthermore, an

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evidentiary hearing on this subject would have illuminated to the Court the true situation of the interrogation conducted at the police station, at night in the presence of uniformed officers. The petitioner is a black man from the south with less than an eighth grade education. The Court should have granted itself an opportunity to review this very important incident de novo.

The same is true of the illegal search and seizure of the petitioner's automobile. This too should have been presented to the Court by means of an evidentiary hearing. Furthermore, a review of authority indicates there is a good probability that the petitioner will prevail on appeal, U.S. v. COMO 340 F2d 89, (2nd Cir. 1965), STATE v. MEMOLI 159 Conn 433, 270 A2d 543 (1970), STATE v. TRUMBULL, 23 Conn Sup. 43, 176 A2d, 887 (1961), and STATE v. HAMMA 150 Conn 457, 191 A2d 124, (1963) also see MAPP v. OHIO 367 U.S. 643, U.S. v. SLUSSER 270 F. 818, U.S. v. HOFFENBERG 24 F. Supp 989, and STATE v. DARWIN 24 Conn Sup 153, 198 A2d 715 (1964)

The petitioner further believes that there is probable cause for appeal in that the defendant-petitioner was not afforded the opportunity to be tried by his peers. Being a black man from the south residing in the city of Hartford and arrested and tried in suburban-rural Tolland County where almost no black people reside is in itself a grounds for appeal on this jury issue. The petitioner could not elect a jury of his peers. It would be fruitless to litigate this matter further in the State Courts because it would be an exercise in futility. Further, counsel that



represented the defendants in the state proceedings including State Habeas Corpus petitions and appeal to the Supreme Court would be the last expected to admit their "strategy" or overlooking the jury issue was a mistake.

There is also the issue of whether Connecticut General Statute, Sec. 54-43 is unconstitutional especially in the use of a bench warrant without oath or affirmation. The fourth ammendment states ..... "no warrants shall issue, but upon probable cause, supported by oath or affirmation..." Conn. Gen. Stat. Sec. 54-43 does not require oaths or affirmations. The provisions of Article IV apply to arrest warrants, GIORDENELLO v. U.S. 357 U.S. 480. The requirement that Bench Warrants be supported by oath or affirmation expressly applies in Connecticut, STATE v. LICARI, 153 Conn 127 (1965). Certainly this indicates probable cause for appeal.

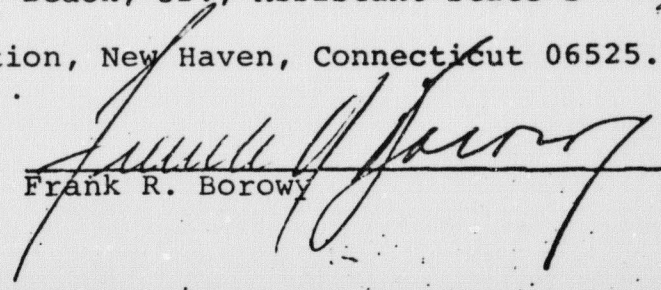
For the above and within reasons, the petitioner prays that the Court issue a Certificate of Probable Cause an appeal does exist.

RESPECTFULLY SUBMITTED  
The Petitioner-appellant,  
Kenneth Schaffer

BY   
Frank R. Borowy MOLLER & BOROWY

CERTIFICATION

This is to certify that a copy of the foregoing was mailed on NOVEMBER 29, 1976 to Robert E. Beach, Jr., Assistant State's Attorney, Drawer H, Amith Station, New Haven, Connecticut 06525.

  
Frank R. Borowy

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